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No. 14

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA, *Petitioner*

v.

GUY W. CAPPS, INC.

REPLY BRIEF FOR APPELLEE

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Appellee.

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PRELIMINARY

When appellant filed its petition for certiorari, this appellee considered that the application probably would be granted because of the Fourth Circuit's election to decide the case on the basis of (1) the invalidity of the trade agreement, and (2) the absence of a cause of action in the United States (204 F. 2d 655). Accordingly, in its opening brief, appellee decided to incorporate its entire position on the whole case, with no thought that any additional brief would be thereafter filed. Its decision to do so was motivated by the further facts that Guy W. Capps, the moving power in the affairs of the corporation which bore his name, had

died in 1950, the appellee corporation had closed the conduct of active business at August 31st, 1950, and its counsel had retired from law practice in 1953.

However, since the award of certiorari, appellant has filed a brief of 75 pages with appendices of 21 pages, and it has devoted approximately 58 printed pages to an attempt to support the initial validity of this trade agreement which expired at June 20th, 1949, and the applicability of the terms thereof to enable the United States to collect money damages from the appellee, where to the knowledge of the Government appellee has no assets which would discharge even a small part of the liability which has been asserted if that liability is finally established. The reason for such an effort must lie in the continuing determination of the Executive branch of our Government to assert and maintain for itself powers superior to the Constitution and laws, and powers which relate not only to the external affairs of the nation but as well to its internal affairs. Surely, it cannot be successfully said that the subject of what quantities of any commodity may be imported into the country in any given time is a subject which relates to more than the internal affairs of the country, nor can it be successfully said that this is a subject which is without the field of Congressional action and is inherent in the President by virtue of his office.

Of necessity, the attitude of counsel in any law suit is measured in large degree by practical considerations; and in this cause, where appellee is no more than a corporate shell with asset values which are required in principal part to satisfy income taxes accruing from the last period of its business activity, and due the Treasury Department, there is little incentive toward that depth

of research or degree of effort which would be in order if appellee's continuance as a business enterprise depended upon the outcome. Certainly there is no desire by appellee's counsel to establish a binding precedent for the benefit of future litigants.

The business career of the corporate appellee is ended, and the legal career of its attorney is likewise ended, so that the only forces which remain in existence to justify the filing of any reply brief are (1) consideration for the efforts and the wisdom of those jurists who have reached decisions favorable to the appellee in the courts below, and (2) the concern which any lawyer feels when assaults are made on the verity of what have been heretofore regarded as legal principles firmly established in the public interest.

In this reply we will content ourselves with correcting misstatements of fact upon which appellant has predicated some of its most weighty arguments, and in pointing up the precise questions which are before this Court for decision, so that the final conclusion will not be marred by any misconceptions of what those questions actually are.

I.

Misstatements of Fact and Arguments on Improper Assumptions.

Under the subcaption "Respondent's Potato Imports" at page 6 of the brief for appellant, it is said that respondent is a Virginia corporation which *grows* and ships potatoes and vegetables on the Eastern Seaboard of the United States. The Capps corporation was never a *grower* of potatoes, or other vegetables,

and there is no testimony that it was. On the contrary, prior to 1948 appellee had been importing and selling Canadian seed potatoes as a part of its general business for a long period of years (R. 132); it was a legitimate American *user* (for resale) of Canadian seed potatoes within the meaning of the term "user" as such term is set forth in the trade agreement (R. 132); and it held a Department of Agriculture license to import Canadian seed potatoes and resell them (R. 132).

At page 7 of the brief for appellant, it is said that actually only one-fifth of the potatoes imported on the S. S. Gangway were of a type suitable for planting in Florida, and substantially the same assertion is repeated at page 17 and at pages 71 and 72 in support of the arguments which appellant attempts to make at those points. The basis for the assertion of unsuitability as to the major portion of the cargo imported on the S. S. Gangway is that about three-fifths of such cargo was Katahdin potatoes, one-fifth Sebago potatoes, nearly one-fifth Cobbler potatoes, and 500 bags were Green Mountain potatoes (R. 101), whereas the Government witness testified at pages 99 and 100 that in the preceding crop year of all of the different varieties of potatoes planted in Florida the three principal varieties were Bliss Triumph, Sebagos, and Pontiacs. There was no Government contention nor testimony that Katahdins (three-fifths of cargo), Cobblers and Green Mountains were not planted in Florida in very substantial quantities. Ordinarily, the variety to be planted is a matter of selection by the individual farmer, and since apparently there are plantings of the varieties contained in this cargo in Florida every year, how can it properly be said that such varieties are "unsuitable.?'

At the bottom of page 7 of the brief for appellant, it is said that the Capps corporation sold all but 10,000 bags of the cargo to the Atlantic Commission Company. Actually, the Capps corporation sold all of the cargo to the Atlantic Commission Company and repurchased 10,000 bags to meet the demands of its established customers to whom it customarily marketed seed potatoes.

At page 8 of the brief for appellant, the following statement appears:

> "The evidence tends to indicate that most, if not all, of the potatoes were sold to retail establishments as table stock potatoes (R. 22-38, 165), and that four-fifths of the potatoes remained in Florida."

We have no hesitancy in asserting that there is not the slightest foundation in the Record for any such statements of fact. Every one of the invoices from the Capps corporation were subject to Government inspection, and every one of those invoices showed that the potatoes in this cargo were sold as Canadian No. 1 Seed potatoes. Neither were the sales to retail establishments, but in substantial quantities to produce dealers who customarily sold seed potatoes (R. 160 and 161). As to those which Atlantic Commission Company sold to Great Atlantic & Pacific Tea Company, the appellant wholly fails to mention the fact that A. & P. Stores customarily sell seed potatoes and other vegetables suitable for planting to home gardners (R. 57, 58, 59). So far as we are able to find, there is no evidence that four-fifths of the potatoes remained in Florida, nor is there any evidence as to their ultimate disposition as to what quantities were eaten and what quantities were planted.

In the brief for appellant at page 61 it is said:

> "It can be shown, in this very instance, that the breach of contract cost the Government a substantial sum of money (supra pp. 8-9; infra pp. 71-75)."

Appellant chooses to ignore that the place for such a showing was in the District Court; that such a showing would be the measure of the damages which the Government sustained; that the Government failed to show that the so-called breach of contract cost it a single penny; and that the District Court found as a fact that the Government had failed to show that the so-called breach of contract cost it a single penny.

At page 65 of the brief for appellant, the assertion is made:

> "Respondent itself does not deny that its telegram was of a contractual character; it merely questions whether it contained a promise enforceable by the United States as a third party."

The appellee has attempted to set forth very clearly at pages 16 and 17 of its initial brief that according to its belief the purpose of the telegram was not to make a promise to the exporter H. B. Willis Co., Inc., but to allow such exporter to get customs clearance for shipment of a cargo which had already been sold.

At page 71 of the brief for appellant, it is asserted that the evidence discloses that the Atlantic Commission Company purchased the potatoes, not for seed purposes but as "potatoes" (R. 62) obviously to be sold for food. On the contrary, the evidence discloses that every sale by the Capps corporation was as

Canadian No. 1 Seed potatoes, and every resale by Atlantic Commission Company was as Canadian No. 1 Seed potatoes, and there is nothing to justify the inference that any successive purchaser bought any part of the potatoes in order to sell them as food, unless one can found such an inference on the fact that some of the purchasers of these potatoes as a part of their general business also sold some potatoes for food.

II.

The Validity of the Potato Agreement as the Foundation for this Action.

The first position taken by appellant is that Section 22 of the Agricultural Adjustment Act of 1948 is not in conflict with the arrangment created by the Potato Agreement, and that such Section authorized the making of the Agreement.

As to whether there is conflict, the creation of Government subsidy for American grown potatoes was by the enactment of the Agricultural Adjustment Act. The Congress there decided that there should be a price support for those American growers who would contract with the Department of Agriculture not to increase the quantity of their prior acreage devoted to potatoes, and who would contract upon certain other conditions. The producers of about 80% of the total quantity of potatoes grown in the United States in 1948 elected to so contract and to have the benefit of price support, whereas the growers of about 20% of the total elected not to contract and to dispose of their own production at their own risk (R. 84, 85). In devising and authorizing the program, the Congress recogniz-

ed that it was customary for a quantity of potatoes, particularly for seed purposes, to be imported into the United States, and that by the measure of such quantity as was in fact imported the quantity grown in the United States might be deprived of a public market, and by reason of that deprivation qualify for compulsory purchase by Commodity Credit Corporation (Petition for Certiorari, page 4; and Section 22, Agricultural Adjustment Act.) Nevertheless, with this knowledge and recognition, the Congress was willing for the United States to purchase these American grown potatoes which were thus deprived of a public market because it expressly provided that before the Government should place any restriction or limitation on the quantity imported from Canada there should be (1) an investigation by the United States Tariff Commission, and (2) the quantitative limitation on commodities imported for consumption should not exceed 50% of the quantity imported during a prior representative period. In 1948 the quantity grown in America was the record crop of all time, and it extended to 454,700,000 bushels, or some 44,700,000 more than the average (R. 73). By the fall of that year the Department of Agriculture took the position, in effect, that although Congress had been willing for the United States Government to bear the burden of the additional quantities which it must purchase by reason of these importations, yet it thought that its judgment was better than the judgment of the Congress on that subject, and that although the Congress had a great concern for the preservation of the established business of importers as such business might be disrupted by a restriction or limitation on importations from Canada, the Department had no such concern, therefore, it would proceed

by an agreement with Canada to restrict importations without any regard to the damage which the import business might thus sustain, and without any regard to the course which the Congress had prescribed for the attainment of the object of limiting importations, and without any regard to the Congressional review of the determination to restrict imports for which the Act provides. It so decided, despite the fact that its sole source of power to deal with the subject emanated from the Agricultural Adjustment Act. By that measure, the Potato (Trade) Agreement was in conflict with the statute. The method adopted to restrict and limit the imports was to get Canada to agree not to issue export permits for any potatoes other than seed potatoes, and none for seed potatoes unless the United States importer would furnish the Canadian exporter with assurances that the shipment would "not be diverted or re-consigned for table stock."

Appellant next says that Section 22 of the Agricultural Adjustmetn Act authorized the making of "this type of agreement." It authorized the making of a trade agreement having as its purpose the restriction or limitation of imports, but only through the course and to the extent specified in the statute. In Section 22(f), it is provided that if the administrative mechanism provided by the Congress for restricting or limiting importations is followed through the course and to the extent which Congress has specified, nevertheless the accomplishment of restricting or limiting administratively under such a course should not be enforced in contravention of any treaty or other international agreement to which the United States was then or thereafter might become a party. Clearly this was no

more than an authorization to the Executive Branch to agree with some foreign power that any limitation or restriction which might be established administratively by following the course which Congress had provided would not be enforced against importations into the United States from such foreign power.

How is it possible to distort the plain meaning of the language used in Section 22(f) as support for the contention that such language justified a restriction or limitation by a course differing from the one which the Congress had prescribed?

At page 31 of the brief for appellant it is urged on this Court that the Potato Agreement should be sustained because the course thereby established was a botter course than the one which Congress had prescribed. This is a familiar assertion frequently made by an Executive seeking to substitute his judgment for the judgment of the Congress. It is the same assertion which was presented on behalf of the Government in justification for seizure of the steel plants. Our answer is that such an appeal should be addressed to the Congress and not to this Court.

III.

There Is No Cause of Action In Favor of the United States.

This point is dealt with at some length at pages 11 to 19 of the opening brief for appellee. In its opinion on the subject, the Fourth Circuit said:

> "We think, also, that no action can be maintained by the Government to recover damages on account of what is essentially a breach of a trade relationship in the absence of express authorization by Congress. The power to regulate foreign commerce is vested in Congress, not in the Executive or the Courts; and the Executive may not exercise the power by entering into Executive Agreements and suing in the courts for damages resulting from breaches of contracts made on the basis of trade agreements."

As further elaboration, we assert that the fact of sovereignty does not in law establish a cause of action for the collection of money in favor of this Government against any of its citizens, and no Executive can create such a cause of action by any act or proclamation originating with him. Certainly, the Potato Agreement if valid was of no greater dignity nor force than a statute would be, and we submt that it could not be successfully contended, for instance, that if the Defense Production Act of 1950 contained a provision for criminal penalties for violation of price ceilings established by the Executive or his representative, but no provision for the collection of overcharges, yet a civil cause of action for the collection of such overcharges

would still exist in favor of the United States. By way of further illustration, let us suppose that the Potato Agreement followed the course prescribed by the Congress for the imposition of a limitation on imports, and to implement such established limitation contained a proviso that Canada would not grant an export permit for any potatoes unless the United States importer held a Department of Agriculture permit to import that particular shipment; that the United States importer made a false representation to the Canadian exporter that he had such Department of Agriculture permit; and that on the faith of such representation the Canadian authorities granted the export permit. Could it be successfully contended in such a situation that a civil action for damages would lie in favor of the United States against the American importer?

IV.

Appellee Breached No Contract, and Appellant Sustained No Damages.

On these important questions, the Court of Appeals for the Fourth Circuit in its opinion said only this:

> "On these facts, we think that judgment was properly entered for the defendant, but for reasons other than those given by the District Court. We have little difficulty in seeing in the evidence breach of contract on the part of defendant and damage resulting to the United States from the breach."

We have attempted to deal with the first question rather carefully at pages 19 to 22 of the opening brief

for appellee, and need add here only a portion of the opinion delivered by the District Court from the bench, contained in the Record beginning at the bottom of page 147 and continuing on page 148:

> "The expression constituting that stipulation is that certified seed potatoes loaded on the S. S. Gangway are for planting in Florida and Georgia. Now, assuming that the Court is correct in holding that that stipulation is an agreement within the meaning of the Executive Treaty or an assurance, as it is called in the Executive Treaty, to the effect that the potatoes would not be diverted or reconsigned for table stock purposes—I say assuming that the Court is correct in holding that this provision is an assurance, *there is no proof here sufficient to go to the jury that there has been such a diversion or reconsignment, or that there has been a lack of diligence or care on the part of this defendant to see to it that its assurance was carried out.*
>
> In the first place, the only diversion or reconsignment was from the defendant to the Atlantic Commission Company. Now that was not a diversion or reconsignment for table stock purposes. Nor does it evidence any want of care on the part of the defendant to see that the assurance was kept, because the evidence shows that this defendant had from year to year sold to Atlantic, potatoes exclusively for seed purposes. The evidence does not justify or would not justify the jury in drawing a conclusion that it was a reckless abandonment by the defendant of its obligation to the use of these potatoes because the defendant had the right to rely upon its previous experiences.
>
> But going further, and assuming that it was incumbent upon the defendant to follow up and see that this reconsignment did not lead to the

use of the potatoes for table stock purposes, we find that the A & P, to whom Atlantic sold, did sell seed potatoes. It is true that it was not its entire trade in potatoes, but it did sell a large amount, described as its secondary function, for seed purposes, and the other sales by Atlantic to wholesalers or to the trade, as it is spoken of, were to firms which used potatoes for seed purposes or disposed of them for seed purposes, so that the sales by the defendant here were equally consistent with the compliance as with the violation of the assurance." (Italics supplied).

On the second question, in the brief for appellant at page 73, the Government attempts to sustain its position by asserting that once the fact of injury has been established respondent cannot escape liability on the ground that the exact amount of the damages was uncertain, or ascertainable only by inferential proof. Appellant can take no comfort from this principle for here the "fact of injury" was never established. In Footnote 106 at the bottom of page 172, appellant says that if the entire cargo on the S. S. Gangway had been planted and none of it had been eaten, then and in that event "compliance with the contract would not have caused the diversion of any American seed potatoes to the table stock market"; but diversion of American seed potatoes to the table stock market is not the foundation which would occasion a financial loss to the United States. The question whether the United States has sustained any damages depends on whether it has been compelled to buy an additional quantity of potatoes above the quantity which it would have bought if this cargo was planted rather than eaten. To us it seems incontrovertible that whether eaten or

planted, if these potatoes displaced any United States grown potatoes in the public market they displaced an equivalent quantity in either event. If all were planted, clearly they displaced an equivalent quantity of United States grown potatoes which were suitable for planting; if all were eaten, they displaced an equivalent quantity of United States grown potatoes which were suitable for eating and probably for planting. Testimony for the Government quoted at page 25 of the opening brief for appellee would seem to be conclusive on this point.

Respectfully submitted,

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